IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MELANIE ANN DICICCO,
Appellant.

No. 2 CA-CR 2013-0132
Filed January 9, 2014

Appeal from the Superior Court in Pima County
No. CR20124485001
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Michael G. Rankin, City Attorney, Tucson
By Baird S. Greene, Deputy City Attorney
and William F. Mills, Principal Assistant Prosecuting City Attorney
Counsel for Appellee

Amy B. Krauss, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Melanie DiCicco appeals from a Pima County Superior Court order affirming her Tucson City Court conviction for owning a dog that attempted to bite her neighbor and its declaration of her dog as "vicious" pursuant to Tucson City Code § 4-7. DiCicco argues the ordinance is unconstitutionally vague because the phrase "attempts to bite" is not defined. Because we find the phrase is not vague, we affirm DiCicco's conviction and sentence.

Factual and Procedural Background

¶2 In March 2012, DiCicco's neighbor contacted police to report that DiCicco's dog ran into her yard and bit her on the ankle. Pima County Animal Care cited DiCicco for failing to have her dog on a leash and for the dog biting the neighbor.

¶3 Following a bench trial in Tucson City Court, DiCicco was found guilty of not having her dog on a leash and of owning a dog which attempted to bite her neighbor. DiCicco appealed her conviction for owning a dog that attempted to bite to the superior court, which denied her request to vacate the conviction. We have jurisdiction over DiCicco's appeal only to review the ordinance's facial validity pursuant to A.R.S. § 22-375(A). *See State v. Putzi*, 223 Ariz. 578, ¶ 2, 225 P.2d 1154, 1155 (App. 2010).

Standing

¶4 The state asserts that DiCicco lacks standing to raise her vagueness claim because her conduct is clearly proscribed by the ordinance. "Ordinarily, a defendant may not challenge a statute as being impermissibly vague or overbroad where the statute has given

him fair notice of the criminality of his own conduct, even though the statute may be unconstitutional when applied to someone else." *State v. McMahon*, 201 Ariz. 548, ¶ 6, 38 P.3d 1213, 1215 (App. 2002). An exception to this requirement exists, however, where an individual challenges a portion of a criminal statute as facially invalid and incapable of any valid application on the grounds that an element of the offense is so ill-defined that it provides no notice of what conduct is proscribed. *See id.*; *State v. Tocco*, 156 Ariz. 110, 112, 750 P.2d 868, 870 (App. 1986), *aff'd*, 156 Ariz. 116, 750 P.2d 874 (1988).

¶5 DiCicco's argument on appeal is necessarily limited to the facial validity of the portion of the ordinance under which she was convicted, *see* § 22-375(A), and consists of the argument that it is so vague it provides no notice of what conduct is proscribed. DiCicco therefore has invoked that exception and has standing to challenge at least the portion of the ordinance under which she was convicted.[1] *See McMahon*, 201 Ariz. 548, ¶ 6, 38 P.3d at 1215.

Vagueness

¶6 The Tucson City Code ("the Code") § 4-7(2)(b) provides that: "The owner of any animal that bites, attempts to bite, endangers or otherwise injures or causes injury to human beings or other animals is guilty of a misdemeanor." DiCicco argues the

[1]DiCicco also contends the terms "endangers," "otherwise injures," and "causes injury" are unconstitutionally vague. The superior court, however, agreed with the state and concluded any challenge regarding those terms was not properly before it and did not rule on the merits of the issue. DiCicco did not object to this ruling and does not address this basis for the court's ruling in her opening brief to this court. Consequently, any such argument is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *State v. Gurrola*, 219 Ariz. 438, n.3, 199 P.3d 693, 694 n.3 (App. 2008) (argument waived when appellant did not challenge basis for trial court's ruling).

ordinance is unconstitutionally vague because the Code does not define "attempts to bite" and therefore does not provide adequate notice of what conduct is prohibited and leads to arbitrary enforcement. *See* § 4-7.

¶7 We review the constitutionality of an ordinance de novo. *Putzi*, 223 Ariz. 578, ¶ 4, 225 P.3d at 1155. When an ordinance is challenged on the basis of vagueness, a strong presumption of constitutionality exists. *State v. Kaiser*, 204 Ariz. 514, ¶ 8, 65 P.3d 463, 466 (App. 2003). Additionally, we will try to interpret the ordinance in such a way as to render it constitutional. *State v. Alawy*, 198 Ariz. 363, ¶ 5, 9 P.3d 1102, 1103 (App. 2000). The defendant bears the burden of establishing the ordinance is invalid beyond a reasonable doubt. *State v. McLamb*, 188 Ariz. 1, 5, 932 P.2d 266, 270 (App. 1996).

¶8 An ordinance is not void for vagueness "if it gives people of ordinary intelligence an opportunity to know what type of conduct is lawful and what is prohibited, and does not encourage arbitrary enforcement." *State v. Phillips*, 178 Ariz. 368, 370, 873 P.2d 706, 708 (App. 1994). Nor is a statute unconstitutionally vague "'simply because it may be difficult to determine how far one can go before the statute is violated.'" *Id.*, *quoting Berenter v. Gallinger*, 173 Ariz. 75, 81, 839 P.2d 1120, 1126 (App. 1992). Due process does not require that statutes be "drafted with absolute precision." *State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991). Moreover, absent a clearly expressed intent by the legislative body to give them special meaning, we will give terms their plain and ordinary meaning. *State v. Mahaney*, 193 Ariz. 566, ¶ 12, 975 P.2d 156, 158 (App. 1999).

¶9 DiCicco argues the meaning of the phrase "attempts to bite" is "completely subjective," and therefore vague, because it has no "objective or universal definition." The common definition of "attempt" is "to try; it implies an effort to bring about a desired result." *State v. Wilson*, 120 Ariz. 72, 74, 584 P.2d 53, 55 (App. 1978). The Code defines "bite" as "any penetration of the skin by the teeth of any animal." § 4-7(1)(a). Hence, the plain language of § 4-7(2)(b) punishes the owner of a dog that tries to penetrate a person's skin with its teeth. *See* § 4-7(2)(b); *Wilson*, 120 Ariz. at 74, 584 P.2d at 55. And although DiCicco asserts the term imposes no requirement that

the dog actually expose a person to harm, she does not cite any authority that exposure to harm is required to save the ordinance from vagueness. The ordinance thus adequately apprises persons of ordinary intelligence of what constitutes proscribed activity. *See Phillips*, 178 Ariz. at 370, 873 P.2d at 708.

¶10 DiCicco next contends the vagueness in § 4-7(2)(b) leads to "arbitrary and discriminatory enforcement" because it "impermissibly confers virtually complete discretion on law enforcement to determine whether the prohibited conduct occurred." But because the language in § 4-7(2)(b) is not vague, it gives "fair and objective guidelines" to law enforcement and does not promote arbitrary enforcement. *See Phillips*, 178 Ariz. at 371, 873 P.2d at 709. "When the language is clear, an ordinance 'is not rendered unconstitutionally vague because there is a theoretical potential for arbitrary enforcement' and 'some assessment by a law enforcement officer' may be required." *Putzi*, 223 Ariz. 578, ¶ 5, 225 P.3d at 1155, *quoting McLamb*, 188 Ariz. at 6, 932 P.2d at 271. We thus cannot say the ordinance as written is incapable of any valid application. *See McMahon*, 201 Ariz. 548, ¶ 6, 38 P.3d at 1215. Accordingly, we reject DiCicco's arguments. Because we conclude § 4-7(2)(b) is not vague or likely to lead to arbitrary enforcement and DiCicco has not demonstrated that the ordinance is invalid beyond a reasonable doubt, her challenge fails. *See McLamb*, 188 Ariz. at 5, 932 P.2d at 270.

¶11 DiCicco finally argues the rule of lenity dictates that this court must "strike the undefined prohibited acts enumerated in . . . § 4-7(2)(b) as unconstitutionally vague." But we only have jurisdiction over this case to resolve the issue of whether § 4-7(2)(b) is facially valid, and we cannot review the manner in which the trial court may have applied the ordinance in this particular case. *See McMahon*, 201 Ariz. 548, ¶ 13, 38 P.3d at 1217. Moreover, DiCicco did not raise this argument in superior court, and we do not consider arguments raised for the first time on appeal except for claims of fundamental error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 16, 185 P.3d 135, 140 (App. 2008). Because DiCicco has failed to argue fundamental error occurred, she has also waived review of this issue. *See id.* ¶ 17.

Disposition

¶12 For the foregoing reasons, the judgment of the superior court is affirmed.